

No. 86-1574

Supreme Court, U.S.  
**FILED**

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# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1986

THE CHEMEHUEVI INDIAN TRIBE,  
*Petitioner,*

VS.

CALIFORNIA STATE BOARD OF EQUALIZATION;  
GEORGE R. REILLY; IRIS STANKEY; WILLIAM M. BENNETT;  
RICHARD NEVINS; KENNETH CORY; individually  
and in their official capacities as members  
of the California State Board of Equalization;  
BANK OF AMERICA, N.T. & S.A.,  
a national banking association; and  
DAVID CORDIER, individually and  
in his capacity as employee of the  
California State Board of Equalization,  
*Respondents.*

**On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit**

### RESPONDENTS' BRIEF IN OPPOSITION

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## **QUESTIONS PRESENTED**

1. When a State and an Indian Tribe impose an identical cigarette tax upon on-reservation sales to non-tribal members, does Article I, Section 8, Clause 3 of the United States Constitution (Commerce Clause) require the State to credit against its tax the amount of the tribal tax?

2. Does imposition of a State cigarette use tax upon on-reservation sales of cigarettes by an Indian Tribe, in the same amount as a tribal cigarette use tax, constitute an impermissible multiple tax burden which discriminates against Indian commerce by placing on-reservation retailers at a competitive disadvantage with off-reservation retailers?

3. Absent a finding that an Indian Tribe is marketing an exemption from State taxation, does imposition of a State cigarette use tax upon sales of cigarettes to non-Indians in the same amount as a tribal cigarette use tax constitute a prohibitive interference with tribal self-government?

4. Is a State Cigarette Use Tax Law, as applied to sales of cigarettes by an Indian Tribe upon its reservation to non-tribal members, preempted by the provisions of the Indian Financing Act, Indian Reorganization Act and the policies embodied in those Acts?

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RESPONDENTS' BRIEF IN OPPOSITION  
REASONS WHY THE WRIT SHOULD BE DENIED

INTRODUCTION

The procedural background of this matter is adequately set forth in the Statement of the Case in the Petition. Respondents are, however, in substantial disagreement with petitioner concerning numerous matters of fact which are asserted in said Statement. Reference to such disputed matters of fact will be made in the arguments with respect to which factual issues are pertinent.

## ARGUMENT

## I

**FAILURE OF A STATE TO AFFORD A CREDIT AGAINST  
A STATE CIGARETTE USE TAX IN THE AMOUNT OF  
A TRIBAL CIGARETTE USE TAX DOES NOT CONTRA-  
VENE THE COMMERCE CLAUSE OF THE UNITED  
STATES CONSTITUTION**

In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), this Court considered the constitutionality of a cigarette use tax which was imposed by the State of Washington upon on-reservation sales of cigarettes to non-Indians. Among the specific issues presented in that case was whether the Commerce Clause required the State of Washington to credit against the state tax the amount of tribal taxes paid by purchasers in order to avoid an unconstitutional economic burden upon commerce.

As in the instant case, the Tribe argued that, if a credit were not given, tribal retailers would be placed at a competitive disadvantage as compared to off-reservation retailers. This court sustained the validity of the Washington tax finding that "The Tribes have failed to demonstrate that business at the smokeshops would be significantly reduced by a State tax without a credit as compared to a State tax with a credit." *Id.* at 157.

Petitioner asserts that it has met the burden of proof which was mandated by the Confederated Tribes' case. It first asserts that, as the District Court found, the Chemehuevi Tribe was not marketing an exemption from State taxation. Second, it is asserted that the Chemehuevi Tribe proved, by expert testimony, that the imposition of the California tax, in addition to that of the Tribe "will have the practical effect of reducing sales of cigarettes from the Tribe's business enterprise." The findings of the District Court do not support this assertion of fact.

At pages 26 through 32 of the District Court decision, attached as Appendix B to the petition, the court reviewed the evidence which was presented concerning a study of the probable impact of the imposition of the State tax in addition to the tribal tax. Among the significant findings were the following:



1. More than three-quarters of the respondents to the study were non-resident visitors to the Reservation: the vast majority of them (82%) being residents of the State of California;

2. Most of the visitors intended to stay at the Reservation at least one night but less than one week;

3. A substantial minority (between 30 to 45%) of both residents and visitors bought cigarettes in amounts of one carton or more;

4. Prices of cigarettes on the Reservation were reported to be approximately 15 cents cheaper per pack and 40 cents cheaper per carton than at off-reservation locations;

5. Approximately 55% of the resident respondents and 38% of the non-resident respondents stated that they would buy fewer cigarettes if the price were increased by 10 cents per pack.

The report concluded that while a majority of visitors who purchased cigarettes on the Reservation did so at prices similar to those paid at home, a sizeable minority could purchase cigarettes at significantly lower prices and that a tax increase of \$1.00 per carton would eliminate this differential and remove the incentive to stockpile for future home use. The report further concluded that, if the State tax were imposed in an amount equal to the tribal tax, both visitors and residents stated that they would purchase fewer cigarettes on the Reservation.

After reviewing the information contained in such study, the trial court was unable to state that the Tribe had sufficiently demonstrated that it would be unable to provide essential tribal services if the State cigarette tax was imposed without affording a credit for the tribal tax. The Court noted that the party conducting the study had conceded that it was "limited in scope" and "lacked a 'rigorous framework for inference' and merely suggested the fact that might be observed if the respondents behaved in accordance with their reported intentions." The Court further noted that the percentage of respondents who purportedly would buy fewer cigarettes was not enormous. The Court concluded that

the Tribe had failed to demonstrate that its ability to conduct its tribal government would be seriously jeopardized if cigarette sales fell to the degree anticipated by the report. In light of the foregoing, respondents submit that the Tribe failed to meet the burden of proof which was imposed by the Confederated Tribes' case.

Considering this same evidence and the decision of the trial court, and citing the Confederated Tribes' case, the Court of Appeal held that evidence of a mere *reduction* in tribal revenues does not invalidate a State tax. See Appendix A, page 1449. In fact, this Court has repeatedly held that Indian retailers have no vested right to a certain volume of sales to non-Indians or, indeed, to any sales at all and that a tax upon such transactions will be valid even though it seriously disadvantages or eliminates business with non-Indians. *Washington v. Confederated Tribes of the Colville Indian Reservation*, *supra*, p. 151 and n. 27; *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 475-76 (1976); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1983); *Crow Tribe of Indians v. State of Mont.*, 650 F.2d 1104, 1109-1111 (9th Cir. 1981) modified, 665 F.2d 1390, cert. denied 459 U.S. 916 (1982); *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253, 1258 (9th Cir. 1976), cert. denied 349 U.S. 983 (1977).

Even if petitioner had met the burden of demonstrating that tribal sales would be significantly reduced by imposition of State tax without a credit, the facts before the trial court constituted a sound basis for sustaining the validity of the State tax in the face of a Commerce Clause challenge. Both the trial court and the appellate court observed that the State provided substantial services both on and off the Reservation.<sup>1</sup> On the basis of evidence concerning services provided by the State on the Reservation, and that the State tax was imposed equally throughout all locations in the State including the Reservation, the State was not required to demonstrate that the level of taxation was justified by the level or

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<sup>1</sup> The various services which were provided by the State, County and Tribe, both on and off the Reservation, will be discussed in detail in subsequent arguments in conjunction with the "particularized inquiry" into the interests of the parties.

quality of services provided by it as a basis for sustaining the tax. *Commonwealth v. Montana*, 453 U.S. 609, 617-629 (1981), rehearing denied, 453 U.S. 927 (1981).

## II

### IMPOSITION OF A STATE TAX IN AN AMOUNT EQUAL TO A TRIBAL TAX DOES NOT CONSTITUTE A BURDEN WHICH DISCRIMINATES AGAINST INDIAN COMMERCE

Petitioner's contention that imposition of the State tax would double the total tax upon cigarettes sold on the Reservation, and thereby impose an unjustifiable economic burden upon the tribal enterprise, is simply a variation of its contention that imposition of the State tax without a credit for the tribal tax imposes an unconstitutional economic burden upon tribal cigarette sales. As set forth in the immediately preceding argument, which is incorporated herein by reference as though fully set forth, this issue was considered and resolved by this court in the *Confederated Tribes* cases. The Washington State tax considered in that case was, in fact, significantly more burdensome than the California tax in that its rate was 16 cents rather 10 cents per pack of cigarettes. For the reasons set forth in the preceding argument, and in light of the substantial State and County services which are provided to the taxpayers, as hereinafter set forth, petitioner's contention concerning the economic impact of double taxation by imposition of the State tax is without merit.

## III

**GOVERNMENTAL SERVICES PROVIDED BY THE  
STATE JUSTIFY TAXATION OF NON-INDIAN PUR-  
CHASERS OF CIGARETTES FROM FEDERALLY FI-  
NANCED COMMERCIAL ENTERPRISES**

Petitioner's third and fourth arguments both deal with the balancing of competing interests as justification for imposition of the State cigarette tax upon sales by tribal enterprises organized and financed under the provisions of the Indian Reorganization Act and Indian Financing Act. In order to provide a comprehensive analysis of the variety of legal and factual considerations which are presented by these issues, and in order to avoid undue repetition, respondent deals with these issues in a single argument.

**A. Preemption Based Upon Federal Financing and Supervision**

The various commercial enterprises through which the Tribe sells cigarettes on the Reservation were organized and financed under the auspices of the Indian Reorganization Act and Indian Financing Act. The general purposes and goals of these acts are to improve the financial well-being and encourage self-sufficiency of Indian tribes. Petitioner contends that, by *reducing* revenues available to the Tribe, the imposition of the California cigarette use tax unjustifiably frustrates, impedes or conflicts with the purposes and goals of these acts and is thereby pre-empted by federal law.

In the *Washington v. Confederated Tribes* case, *supra*, this court considered the issue of preemption of the Washington sales and cigarette taxes by the Indian Reorganization Act and the Indian Financing Act. Noting that each of the acts evidenced varying degrees of congressional concern with fostering tribal self government and economic development, the Court concluded that federal statutes "even when given the broadest reading to which they are fairly susceptible, cannot be said to pre-empt Washington's sales and cigarette taxes. *Id.* at 155. This holding was consistent with prior decision of this court including *Mescalero Apache Tribe v. Jones*, *supra* and *Moe v. Salish & Kootenai Tribes*, *supra*.

In the *Mescalero Apache* case, as in the instant case, a tribal resort had been developed under the auspices of the Indian Reorganization Act and was funded by federal loans. The resort was located off the Reservation on land leased from the United States Forest Service. Rejecting the claim that a State gross receipt tax upon revenues generated by the resort was pre-empted, the Court observed that the theory that a federal instrumentality was involved and that the State tax would interfere with the ability of the government to realize the maximum return for its wards (Tribal members) has long since been rejected. *Id.* at p. 150.

The lack of pre-emption as a basis for invalidation of a State tax on the ground that it would *reduce* tribal revenues in conflict with the goal of tribal economic self-sufficiency is based upon sound logic. If the contention of petitioner were adopted by this Court, any tribal commercial enterprise founded or operated with federal funding would be immune from any State taxation notwithstanding the fact that the tribal enterprise was in direct competition with off-reservation non-tribal enterprises and that the tax payers were non-Indians.

## **B. Balancing State and Tribal Interests**

Citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), petitioner contends that the determination of whether a state law conflicts with overall policies embodied in a federal statute requires a "particularized inquiry into the nature of the State, federal and tribal interests at stake," *Id.* at p. 333. Such an inquiry was mandated by this Court in the *Confederated Tribes* case in the following language:

"The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State on the other. *McClanahan v. Arizona State Tax Comm'n*, *supra* at 179. While the tribes do have an interest in raising revenue for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the Reservation, by activities involving

the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of State services." *Id.* at pp. 156-57.

Notwithstanding petitioner's contention to the contrary, such a balancing test was applied by both the trial and appellant courts in the instant case.

### C. "On-Reservation" v. "Off-Reservation" Value

Of significance in application of the "particularized inquiry" and balancing of interests test is the characterization of the subject of the taxation. The tribe asserts that the cigarettes which it sells have "on-reservation value" because they are sold during the course of operation of a "resort" at a remote rural location. Although upholding the State tax after applying the balancing of interests test, the trial court curiously agreed with petitioner's characterization on the apparent ground that the Tribe sold cigarettes as part of a legitimate business enterprise to persons who lived on the Reservation or entered there in order to enjoy its recreational resources. Appendix B, p. 29. Although noting that the trial court had found that the tax was not directed at "off-reservation value," the appellate court observed that the trial court had nonetheless viewed the case as materially different from cases where States have attempted to tax the value of natural resources. Appendix A, p. 149.

Respondents have consistently maintained that cigarettes, as the subject of State taxation, do not represent "on-reservation value" as that term has been contemplated by this Court. Cases which have held State taxation of reservation resources invalid have traditionally involved natural resources located on the Reservation. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) [timber]; *Crow Tribe of Indians v. State of Mont.*, *Supra*, [coal]. Of particular significance to the determination of what constitutes "on-reservation value" is the analysis of such concept in *New Mexico v. Mescalero Apache Tribe*, *supra*. in that case, the State sought to regulate hunting and fishing by non-



Indians on the Reservation. Artificial lakes had been constructed and stocked with fish and a fish hatchery had been constructed. The elk population on the reservation had been significantly increased over a period of years. All such activities had been conducted by the Tribe with the assistance of various federal agencies. The State had in no way assisted in the development or management of the on-reservation resources. *Id.* at pp. 27-28. With respect to the concept of "on-reservation value" this Court made the following observation:

"This case is thus far removed from those situations such as on-reservation sales outlets which market to non-members goods not manufactured by the tribe or its members in which the tribal contribution to an enterprise is *de minimus*. See *Washington v. Confederated Tribes of Colville Indian Reservation*, 477 U.S., at 154-159." *id.* at 156-57.

The appellate court in the instant case agreed with respondents noting that "[t]he Chemehuevis are not developing and marketing a tribal resource; they are importing a finished product and reselling it to residents and visitors." Appendix A, at p. 1449.

Respondents submit that, for purposes of analysis in determining validity of State taxes, merchandise which is manufactured off the Reservation, purchased at wholesale and sold at retail on the Reservation may not logically be considered the substantial equivalent of natural resources or other resources which are created on a reservation by tribal members.

**D. Taxation of Non-Indian Purchasers of Cigarettes on the Chemehuevi Reservation is Justified by Governmental Services Provided by the State and County Both on and off the Reservation**

Petitioner challenges the "particularized inquiry" and balancing which was conducted in the instant case first by asserting that only on-reservation government services provided by the State and County in connection with the retail sale of cigarettes should have been considered by the trial and appellate courts. In support of this proposition, petitioner relies upon language in *New Mexico v. Mescalero Tribe*, *supra*, p. 333 and *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832-884, n. 9 (1982).

The facts of both of such cases are readily distinguishable from the instant case. In neither of such cases did the State provide services upon the Reservation on the basis of which it sought to justify the imposition of taxes.

Additionally, in *California v. Cabazon Band of Mission Indians*, 55 U.S. Law Week 4225 (Feb. 25, 1987), this Court considered the circumstances under which a State might validly assert authority over activities of non-members on the Reservation. Referring to the *Moe* and *Coville* decisions, the Court stated:

"In those decisions we held that, in the absence of express congressional permission, a State could require tribal smokeshops on Indian reservation to collect State sales tax from their non-Indian customers. Both cases involved non-members entering and purchasing tobacco products on the reservations involved. The State's interest in assuring the collection of sales taxes from non-Indians enjoying the *off-reservation* services of the State was sufficient to warrant the minimal burden imposed on the tribal smokeshop operators." (Emphasis added.)

The evidence in the instant case reflected that a substantial majority of the purchases of cigarettes were made by non-Indians residing both on and off the Reservation and enjoying governmental services throughout the State as well as on the Reservation. Appendix B, pp. 3, 30-33; Appendix A, p. 1449.

Even if only on-Reservation services provided by the State and County might properly be considered in determining the validity of the tax under the balancing test, the evidence demonstrated, and the trial court found, that such services were substantial. Petitioner concedes that the State performed law enforcement and road maintenance services on the Reservation. The evidence demonstrated that maintenance was also performed upon the road which led to the Reservation and carried no through traffic to points other than those on or immediately adjacent to the Reservation. Appendix B, p. 4. The law enforcement services provided by the County are mandated by federal law. 18 U.S.C. § 1162.

Petitioner asserts that the Tribe provides for government services on the reservation which constitute the "lion's share" of



government services on the Reservation. This assertion is unsupported by the record and contrary to the trial court decision.

In summary, petitioner challenges the factual conclusions which were drawn by the trial and appellate courts concerning services received by taxpayers and provided by the State, County and Tribe as the basis for their legal determinations that the State tax upon non-Indian purchasers of cigarettes on the Reservation was justified. In the final analysis, it cannot seriously be contended that either the trial or appellate court failed to conduct a "particularized inquiry" into the services provided by these various entities or to balance the interests of the parties in determining the validity of the tax or that the substantial State and County services provided both on and off the Reservation justify the State tax.

### CONCLUSION

Petitioner has failed to offer any legitimate basis for review by this Court. Accordingly, the petition for writ of certiorari should be denied.

Dated: April 27, 1987

Respectfully submitted,

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